United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA

v.

THE AMERICAN TOBACCO COMPANY AND OTHERS.

BEFORE LACOMBE, COXE, WARD, AND NOYES, CIRCUIT JUDGES.

OPINION OF THE COURT ON HEARING OF APPLICATION FOR APPROVAL OF PLAN OF DISINTEGRATION.

NOVEMBER 8, 1911.

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA

v.

THE AMERICAN TOBACCO COMPANY AND OTHERS.

BEFORE LACOMBE, COXE, WARD, AND NOYES, CIRCUIT JUDGES.

LACOMBE, *C. J.:*

In compliance with the directions of the Supreme Court we have heard the parties upon a plan proposed by the American Tobacco Company for "dissolving the combination and for recreating out of the elements now composing it a new condition which shall honestly be in harmony with and not repugnant to the law." The proposed plan was filed two weeks before this hearing, at which not only the parties but any persons interested who might wish to express their views as friends of the court were given opportunity so to do.

While the plan is correctly described as the proposed plan of the American Tobacco Company since that corporation and the other defendants offer to carry it out, it should be remembered that in its present form the plan is the fruit of much discussion.

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For upward of two months successive conferences, in the presence of two or more members of the court, were had between the Attorney General and the counsel and representatives of the Tobacco Company. Objections of the Attorney General were followed by modifications of the plan, some of its most drastic provisions being inserted in order to meet or avoid his criticisms. When a point was reached where such adjustment of differences ceased to be practicable, a time was fixed for a hearing before the whole court upon the matters remaining in dispute. It was in the course of these conferences that a very material reduction of the holdings of the American Tobacco Company was brought about. According to the plan as originally proposed it was to retain in its treasury in addition to its working capital, sufficient to pay the outstanding bonds when they matured, about $104,000,000. To this the Attorney General at once objected, insisting that the possession of this enormous amount of money over and above its capital invested in the tobacco business was fraught with possibilities of evil use, that it would be a standing menace to all competitors, and could not be tolerated. While not fully conceding the justice of this criticism, counsel for defendants promptly stated that they would undertake to eliminate it. After discussion of two different methods of so doing, which themselves presented other difficulties, defendants at the last conference submitted the present scheme, whereby half of the outstanding bonds would be bought up (and canceled) at a price

in excess of their present value, thus insuring a willing surrender of them by present holders, and for the other half securities of the new companies would be offered, on a basis of exchange which would insure acceptance of the offer. Since the plan was filed the market reports have given quotations of such bonds of the new companies "if and when." While such reports are possibly not competent evidence in the trial of a cause they seem to indicate that if the present plan be approved, a very brief period will suffice for the disappearance of substantially all the old bonds and the elimination from the treasury of the American Company of the money or securities required to make them good at maturity. Thus the menace of holding an enormous amount of money additional to what is legitimately used in the business of the American Company will disappear. Upon the hearing committees representing a majority of the holders of both issues of bonds appeared and requested the court to approve the plan. Out of the entire two issues, amounting to over $100,000,000. one holder only of ten 4 per cent bonds appeared to object on the ground that the terms offered for sale and exchange were not satisfactory to him. Inasmuch as he is under no obligation to accept the offer if it does not please him and the security for his bonds, if the plan be carried out, will be ample, no modification of the plan is necessary to protect him or others similarly situated. A committee representing a majority of the preferred stockholders also asked that the proposed plan be approved.

The plan contains very many provisions, necessarily so because of the intricate nature of the combination of corporations about to be disrupted. It would unreasonably extend this opinion to undertake to epitomize these provisions. An admirably clear summary of them has been filed by the proponents and may be considered as in the nature of a recital to this opinion. Besides distributing among its common stockholders a large amount of the stock it now holds in other companies, the American Tobacco Company will be split into three companies which, with a fourth set free of control by the American Company through such distribution of stock, will divide between themselves the property now owned and the business now done by the American Company. Each of these four companies will thus have a business which, in every branch of it, will fall materially below a percentage sufficient to control. There are similar disruptions among the accessory companies, for the details of which the plan or the summary may be consulted.

Some of those who have been heard in opposition insist that no plan is practicable, that in conformity with the statute as construed by the Supreme Court the only thing for this court to do is to seize the property through receivership and proceed to sell it. This proposition need not be discussed; evidently the Supreme Court believed some plan was practicable, or it would not have directed this court to inquire into the matter.

Upon the hearing other plans for dissolving and recreating were submitted, plans not merely suggesting modifications of the one proposed, but differing widely from it in form and scope. One of them calls for a division into upward of sixty different companies. Others for a distribution of properties by specific allotments as in the case of a partition of real estate. No time need be given to a consideration of any of these, since there is no suggestion that the defendants will adopt them. On the contrary counsel for the defendants expressly stated on the argument that they would not undertake to carry them out. Presumably they might think they might better take their chances at receiver's sale. This court has neither authority nor power to carry out and enforce any plan of readjustment without the cooperation of the owners of the property, the holders of these stocks and bonds. It would be sheer waste of time, therefore, to consider any plan radically different from the one now before us; if we find this plan would not create the condition defined in the opinion of the Supreme Court, or if such modifications as we may require as a condition of giving our approval are not accepted by defendants, we must obey the mandate of that court; must seize the property and sell it at public auction, in appropriate and convenient lots, applying the proceeds of the sale to the payment of the debts (including the mortgages) or of such dividend thereon as the proceeds may allow, turning over the surplus, if any, to the owners of the equity.

The main objection to the proposed plan, an objection found in every document filed by those who were given permission to be heard and which seemed to be principally relied on by those who spoke, is what is referred to as "common stockholding." For instance under the plan two new companies "Lorillard" and "Liggett & Myers" will be formed out of the American, which will itself, thus reduced in size, continue in existence. The same individuals, the present 1,800 or more common stockholders of the American, will hold the entire common stock of each of the other two companies. A similar condition will exist with some, at least, of the other companies. It is contended, that although under such circumstances there may be potential competition, no real competition can exist. With this argument or the reply to it, it seems to me this court is not concerned. In two recent cases (the Northern Securities and the Standard Oil) the Supreme Court found a combination of corporations to have offended against the antitrust act. As a result of such finding there was a disintegration of the combination, in each the disintegration left the stock of the separate entities into which the group was split in the hands of the same body of individual stockholders. Since there was no disapproval of this method of disintegration indicated in either opinion, it would seem that the question whether or not common stockholding is "repugnant to the law," that is repugnant to the antitrust act, has been settled for this court by controlling authority.

It is true that the Supreme Court did not enter into any discussion of this question of "common ownership," but its existence in both cases was so plainly manifest that it is difficult to understand how the court could have approved of the new arrangement unless it was satisfied that such arrangement did not contain the same vice as the old one, which they held must be terminated. If this be so, discussion here of the question whether or not common ownership is within the prohibition of the statute would seem to be academic. This also seems to be the view of the Government, which does not discuss common stockholding.

The next objection presented by those, not parties, who have been heard is directed to the size of the companies. As an illustration, it appears from the statistics submitted that of the total smoking-tobacco business of the country four companies will have the following percentages: American, 33.08; Liggett & Myers, 20.05; Lorillard, 22.82; Reynolds, 2.66. It is insisted that these large companies should be still further disintegrated. The plan is further criticized because each of these companies is described as "completely equipped for the conduct of a large tobacco business," whereas existing independent concerns are none of them so equipped, and it is argued that there can be no effective competition until the several concerns which are to carry forward the business of the trust are put into the same condition as to size and equipment as now prevails among existing independent concerns. It is further contended that no com-

pany engaged in the plug-tobacco business should be allowed to take over any cigarette or cigar business; that a company taking a cigarette business should not take over any smoking-tobacco, plug, or cigar business and so on; that there should be a rearrangement of factories and brands, an intricate subject, which is fully discussed in a report from the Bureau of Corporations, filed at the hearing. Manifestly, the minuter the fragments into which the old combination is split, and the more they are prohibited from conducting business as other companies are free to conduct it, the less will be their ability to compete with such other companies.

This whole line of argument deals with the economics of the tobacco business. No doubt the novel problem presented to this court is connected with questions of economics as well as with question of law. But this is a court of law, not a commerce commission, and the legal side of the proposition would seem to be the controlling one. The true way to state the problem, as I understand it, is this: Assume that a group of corporations engaged in some business which comes within the domain of interstate commerce is charged before the Supreme Court with violation of the antitrust act. Assume that they are organized as the companies provided for in this plan will be; that they are similarly capitalized; that the business they do is similar in amount and similarly distributed; that their stock is similarly held, with the natural temptation to cooperate which such common stockholding may be calculated to

induce, but are also curbed and restrained from yielding to such temptation, as these companies will be by the injunction which will accompany our approval of this plan, a permanent injunction binding all defendants in this suit and their privies and all new companies created under the plan and their privies. Would the Supreme Court hold that the condition thus presented was "repugnant to the law"—that is, repugnant to the antitrust statute? A long and careful study of the last two deliverances of that court (in the Standard Oil case and in this case) has convinced me that its answer to that question would be in the negative. I may be wrong in the interpretation of its deliverances, if so it will not be for the first time, but since such is my conviction there would seem to be no necessity for discussing, on its economic side, a question already settled by controlling authority.

Leaving for a moment the objections and suggestions of persons not parties, those of the Attorney General may be next considered. He does not attack the general features of the proposed plan with its division of the business controlled by the old company among fourteen companies, nor does he contend that "common stockholding" is in and by itself an infraction of the antitrust statute. His suggested modifications are directed, mainly toward providing such safeguards for the future that the fourteen companies may not so conduct their operations as to violate the provisions of the statute. He requests that the following conditions to any approval of the plan

submitted be imposed; presumably the more convenient way to impose most of such restrictions would be by injunctive provisions incorporated in the final decree.

(1) That during a period of not less than five years, no one of the corporations among which the properties and businesses now in the combination are to be distributed shall have any officer or director who is also an officer or director in any other of such corporations. This suggestion is approved.

(2) That the plan be so modified that the principal company shall dispose of and, when the disintegration is complete shall not retain any of the stocks of any of the accessory companies, and each of the accessory companies shall dispose of all of the stocks held by it of the principal and of each of the other accessory companies held by it.

The general proposition here advanced is sound and is approved, but the last clause seems to be already provided for and there is probably an exception or two necessary to be made in the first clause, by reason of the rights of outstanding stockholders not connected with the American Tobacco Company. Counsel can probably agree as to a phraseology which will conform more especially to the facts.

(3) That no one of the corporations among which the property and businesses now in the combination are to be distributed shall, during the same period, retain or employ the same agency for the purchase of tobacco leaf or other raw material, or for the sale

of tobacco or other products, as that of any other of such corporations.

There should be a change of phraseology in this and some of the other requests. It is not entirely clear whether the prohibition is directed to all the 14 companies or only to a part of them; it should apply to all. After the words "agency for the purchase" there should be added the words "in the United States." This request, with such modifications is approved, and counsel may agree on a phraseology which will cover any possible exceptions arising from the allotments in the plan.

(4) That no one of the corporations among which the property and businesses now in the combination are to be distributed shall retain or employ the same clerical or other organization, or occupy the same office or offices as any other of the said corporations.

This is approved, with modifications similar to those indicated as to the request next above.

(5) That no one of the corporations among which the properties and businesses now in the combination are to be distributed shall retain and hold capital stock in any other corporation, any part of whose stock is also retained and held by any of the other of the corporations among which such properties and businesses are to be distributed, or shall purchase or acquire any stock in any other of such corporations.

This is approved, but should contain an exception, upon which it is understood counsel are in accord, in the single case of the Porto Rican Leaf

Tobacco Company. Counsel may agree upon the phraseology to be inserted in the decree.

(6) That no one of the corporations among which the properties and businesses now in the combination are to be distributed shall, during a period of five years, directly or indirectly acquire any stock in any one of the others of said corporations, or purchase or acquire the property or business, or both, of any other of said corporations.

With a change of phraseology which will make this applicable to all the fourteen companies this request is approved. A similar request is found among those submitted by other objectors, with an additional clause forbidding any one of these fourteen companies "from making loans or otherwise extending credit to" any of the others. This suggestion is a proper one and may be embodied in the Attorney General's request.

(7) To the end that the twenty-nine individual defendants in this suit shall not increase their control over any of the corporations among which the properties and businesses now in the combination are to be distributed, pursuant to the plan that such defendants be severally enjoined from, at any time within five years from the date of the decree, acquiring, directly or indirectly, the legal or equitable ownership of any amount of stock in any one of said corporations in addition to the amounts which they will respectively hold if and when the plan shall have been carried out, as proposed.

This is approved but the phraseology should be modified as already indicated.

Upon the argument the Attorney General stated that he would be willing to substitute "three years" for "five years." Such change seems desirable and it would probably result in a more rapid distribution of present holdings. There should also be a proviso excepting from the operation of this prohibition any and all sales and purchases by these twenty-nine individuals *inter-sese,* the phraseology of which counsel may agree upon.

It may not be a wise public policy to make it easy for foreigners to take over the control of the British American Company with its large and growing business in foreign countries, notably in South Africa and the Far East, now in American hands. That is what would probably happen if the twenty-nine defendants be prohibited from increasing their holdings of that stock. We do not undertake to determine this question of public policy, which is one for the consideration of the executive branch of the Government. It is sufficient to say that a further exception of the shares of that company from the operation of this paragraph would not, in our opinion, make the plan repugnant to the law.

(8) That the preferred stock of the American Cigar Company aggregating in book value $2,530,216.69, held by the American Snuff Company, and the stock and bonds of American Tobacco Company, held by the American Snuff Company, referred to on page 2 of the plan (footnote *a*), be sold or otherwise disposed of within one year, instead of three years, as

proposed in the plan, with leave to defendants to apply to the court to extend such period for not more than two years.

There seems to be no good reason for modifying the plan in this particular.

(9) That in the distribution of the properties and businesses now held in the combination pursuant to the plan of disintegration, no corporation shall be allowed to acquire property, tangible or intangible, which would invest it with as much as forty per cent in volume or in value of any particular line of the tobacco business.

This is substantially what the plan now provides. The few instances in which the 40 per cent limitation is exceeded result from inherent difficulties of distribution, which it seems impracticable to eliminate. These instances are so few and the excess in each instance so small as to be fairly negligible. The request is denied.

(10) That the stocks of the Liggett & Myers Tobacco Company and P. Lorillard Company, provided to be in accordance with the plan, be deposited with the Guaranty Trust Company of New York, as the agent or depository of this court in this cause for the purposes specified in the plan, and that at the end of the period designated the court make an order for their further disposition. That in the meantime no voting right, with respect to such stock, shall be exercised except as the court may from time to time order.

All of this is already sufficiently provided for in the plan.

(11) That all the covenants in any way restricting the right of any company or individual in the combination to buy, manufacture, or sell tobacco or its products should be rescinded by the affirmative action of the respective parties thereto who are parties to this suit.

This is approved, except that there should be a proviso excepting certain foreign business, the phraseology of which counsel may agree upon.

(12) That the action proposed in subdivision C of the plan on page 6 terminating certain covenants be amplified so as to include like action with respect to all covenants not only concerning the tobacco business, but any other business which is in any way embraced in the combination.

This is approved; we understand the proposed plan as so providing in spirit, if not in letter.

(13) That all contracts or covenants between the American Tobacco Company, or any other companies in the combination and the British-American Tobacco Company giving to the latter company the exclusive right to manufacture or sell brands belonging to any of the companies in the combination, be rescinded or otherwise terminated.

The brands thus sold passed to the purchaser for a valuable consideration under an executed contract. The request is denied.

The fourteenth request deals with the United Cigars Company, a subject which will be treated separately *infra*.

The Attorney General further asks for a comprehensive injunction to be incorporated in the final decree providing—

> That the defendants named in the petition their respective officers, directors, agents, servants, and employees, be forever enjoined and prohibited from continuing or carrying into further effect the combination adjudged illegal by the Supreme Court, and from entering into or forming any like combination or conspiracy, the effect of which is or will be to restrain commerce in tobacco or its products or in articles used in connection with the manufacture and trade in tobacco and its products, among the States or in the Territories or with foreign nations, or to prolong the unlawful monopoly of such commerce obtained and possessed by the defendants, as adjudged herein in violation of the act of Congress approved July 2, 1890, either—
>
> 1. By causing the conveyance of the physical property and business of any of the corporations among which the properties and businesses now in the combination are to be distributed to any other of said corporations; by placing the stocks of any one or more of said corporations in the hands of voting trustees or controlling the voting power of such stocks by any similar device; or
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> 2. By making any express or implied agreement or arrangements together or one with another like those adjudged illegal by the Supreme Court in this cause, relative to the control or management of any of said corpo-

rations, or the price or terms of purchase, or of sale, of tobacco or any of its products, or the supplies or other product dealt with in connection with the tobacco business, or relative to the purchase, sale, transportation or manufacture of tobacco, or its product or supplies or other product dealt with as aforesaid, by any of the parties hereto, which will have a like effect in restraint of commerce among the States, in the Territories and with foreign nations to that of the combination the operation of which is enjoined in this cause; or by making any agreement or arrangement of any kind with any other of such corporations under which trade or business is apportioned between such corporations, in respect either to customers or localities; or by any of such corporations doing business directly or indirectly, under any other than their own corporate respective names; by refusing to sell to any jobber any brands of any tobacco product manufactured by it except upon condition that such jobber shall purchase from the vendor some other brand or product, also manufactured and sold by it; or

3. By the British American Company and the Imperial Company employing a common agent for the purchase of leaf tobacco in the United States, or by either of said two companies uniting with any of the corporations among which the properties and businesses now in the combination are to be distributed, in the employment of a common agent for the purchase of tobacco leaf.

The clause in the latter part of subdivision 2 as to each company doing business under its own corporate name should be made more specific, especially in view of the requests of other objectors that tobacco products should be sold only under the name of the owner. There should be nothing in the decree destroying the value of a brand, or altering the classification of products in the records of the Internal-Revenue Bureau. Counsel may agree upon a modified phraseology to avoid any such difficulty leaving the fourteen companies to pursue all ordinary methods prevailing in the tobacco business.

The clause as to refusing to sell to any jobber should be reconstructed so as not to prohibit any of the fourteen companies from methods of business which are open to and practiced by all their competitors. Counsel may agree to a phraseology which will formulate this expression of opinion.

Clause 3 should be amended by adding the words "within the United States."

With these modifications the entire section providing for injunctions is approved.

Returning now to the requests of the various other objectors we find that nearly all of them are covered by those of the Attorney General, or have been already disposed of by the discussion of the general features of the plan. Among those not so disposed of are noted requests that the fourteen companies be enjoined:

(*a*) From giving away or selling at or below the cost of manufacture and distribution any of its

products; from giving rebates, allowances, or other special inducements to purchasers or users and from refusing to sell to any jobber any special brand he may require.

The record in this case shows that these are the common methods of the tobacco business, practiced by all alike. It is only by giving away samples, or by offering on favorable terms, irrespective of cost, that new brands of tobacco products can be introduced or old brands extended into new territory. All other companies are free to employ these methods, which are obnoxious to no statute and there is no reason why the fourteen companies should be forbidden to do so. This request is denied.

(*b*) From espionage on the business of any competitor, from bribery of the employees of such competitor, and from obtaining information from any United States revenue official.

Why any one individual or corporation engaged in this business may not acquire such information as he or it can legitimately obtain from private or public sources as to the business of a competitor we fail to see. When illegitimate methods are proved they may be dealt with. This request is denied.

(*c*) That every independent or other person interested should in the event of any alleged violation of the injunction, have liberty to apply to the court for protection and for such action as may appear to be appropriate.

The result of such a provision would be to overwhelm the court with a multitude of applications, mainly frivolous. Anyone who feels aggrieved should take his complaint to the Attorney General, who will winnow the wheat from the chaff. If he finds substance in any allegation he can bring it before the court.

This request is denied.

(*d*) It is requested that the majority stock of the Lipfort Scales Company, now owned by the R. J. Reynolds Tobacco Company be sold, "with an injunction against any present stockholder in the Reynolds Company, in the American Company or in any of the allied companies, from purchasing at such sale." A similar request for a sale, under like restrictions, is made as to the stock of five other companies now owned by the American Tobacco Company.

This request is denied for reasons set forth *infra* in discussing the disposition of the stock of the United Cigar Stores Company.

(*e*) The attorney general of the State of New York suggests that the proposed plan *may* violate the antimonopoly laws of this State. He does not indicate in what respect it will do so.

We think it unnecessary to make any investigation on the line suggested. Our approval of this plan will not secure to these fourteen companies immunity for violation of the laws of this or of any other State.

Referring next to the defendant the Imperial Tobacco Company, the Attorney General asks that the plan shall include provisions terminating all executory contracts or agreements between the Imperial Tobacco Company, on the one hand, and the American Tobacco Company and the British American Tobacco Company and each and every of the corporations parties defendant hereto, on the other; and also a provision enjoining the said American Tobacco Company from uniting with the British American Company in the employment of a common agent for the purchase of leaf tobacco in the United States, and from uniting with any of the corporations among which the properties and business now in the combination are to be distributed, in the employment of a common agent for the purchase of leaf tobacco or any of the products of tobacco.

These provisions, of course, should be restricted to such as affect trade or commerce between the States, or between the United States and foreign countries. We understand that the proposed plan in substance so provides; but if there be any doubt as to its doing so, counsel may agree on the form of amendments which will insert these provisions.

The disposition of the United Cigars Stores Company has been discussed by most of the objectors. Those who represent the independents insist that it shall be split up into separate concerns, "preferably ten."

It is not one of the so-called accessory companies and the Supreme Court has not directed that it be

disintegrated. Upon the trial much testimony was taken as to this company and the question whether or not it was a combination obnoxious to the provisions of the antitrust act was carefully examined. We reached the conclusion unanimously that it was not. A succinct statement of our reasons for reaching that conclusion will be found in Judge Coxe's opinion. (164 F. R., 700.) We therefore dismissed the bill as to that company. The Supreme Court, however, held that we erred in so doing, solely because the American Tobacco Company had bought and held two-thirds of its capital stock, which brought it into the general combination. Under the proposed plan all this stock held by the American Tobacco Company is to be distributed to its own common stockholders, and the sole ground upon which the Supreme Court reversed this court is thus removed. The situation will then stand, as to all other grounds, as it did before and we see no reason to change the opinion expressed on the original hearing. No new evidence is offered except to the fact that it has in the interim largely increased the number of its stores. Such increase however, leaves it in control of less than four per cent of the entire business in which it is engaged. The request to disintegrate is denied.

The Attorney General does not ask that it be disintegrated. He has, however, argued at length and with much earnestness that the continued growth of this enterprise affects the small retail dealer, who is without capital to compete with it and applies to the Government to protect him. There may come a time

when the growth of this company or the methods by which such growth is stimulated may bring it within the prohibition of the statute. But that time has not yet come, and the only request the Attorney General, in response to appeals for aid, has formulated is this:

That the stock of the United Cigar Stores Company be sold and distributed to parties other than the twenty-nine individual defendants or others of the common stockholders of the American Tobacco Company, to the end that the corporation be entirely separated from any connection with the corporations to which the properties and businesses now in the combination are to be distributed.

We have no power to grant any such request. The antitrust act carefully enumerates the penalties for a violation of its provisions; fines, imprisonment, injunction against continuing to transact interstate business, treble damages to all persons injured by an unlawful combination, seizure and forfeiture of property in course of interstate transportation. These are certainly ample to enforce obedience; by confiscation of property in transit and injunction against continuance in interstate business an offender may be put out of active existence into a state of paralysis as helpless as dissolution. It might be said that to these penalties the Supreme Court has added another, a qualified confiscation of property not in transit by receivership and forced sale.

Nowhere, however, is there any authority for the proposition that this court may seize the property of private persons who may have offended against the

statute and sell it under conditions which would preclude the holder of the title or the owner of the equity from bidding at the sale so as to compel the purchaser to pay a reasonable price for it, or from buying it himself if no one else will pay full value for it. That is confiscation; none the less so because the proceeds of such a sale, after paying outstanding debts and expenses, are to be turned over to the owner. Until Congress shall expressly give such power to this court, or until some obscure language in its grant of power shall be construed by the Supreme Court as in effect conveying such power, this court is not prepared to assume that it possesses any such authority. The request is denied.

The Ludington Cigarette Machine Company, which has a decree for an accounting against the Anargyros Company, has applied for relief. The stock of the last-named company is by the plan to be transferred to P. Lorillard Company. The Ludington Company asks for the insertion of a provision which will secure it against any resulting difficulty on such accounting.

Provision should be made in carrying out the plan for keeping intact the books and records of the American Tobacco Company, its present constituents and branches, so that they shall be available and subject to examination to the same extent as at present in suits for accounting and other existing litigation.

The Attorney General further requests that there should be reserved to the Government the right at any time within five years from date of entry to

apply to the court for other and further relief upon a showing that, as a matter of fact, such plan has not resulted in creating a new condition which shall be honestly in harmony with and not repugnant to the law.

It is not apparent that this court has the power so to do. Had it not been for the mandate of the Supreme Court it might be questioned whether a Circuit Court of the United States had any jurisdiction to re-create a new group of corporations out of the elements into which a preexisting group of corporations had been split or to formulate a plan or method according to which individuals, natural or corporate, were to be invited to invest money and embark in business. All such questions are of course, resolved for us by the decision of the court of last resort. But neither in its mandate nor in its opinion is there any warrant for the conclusion that this court is to prescribe the temporary terms of a *modus vivendi*, with power to reassemble five years hence, ourselves, or our survivors and successors, and modify those terms, while in the interim by purchase or exchange of these bonds upward of one hundred millions of dollars worth of property shall have exchanged hands irrevocably. The only function assigned to us is to consider any proposed plan which responsible parties engage to carry out, and approve or reject it; in the event of rejection the only alternative is injunction, receivership and sale. The time limit fixed in the mandate, six months and possibly two more, precludes any other construction of its terms.

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA
v.
THE AMERICAN TOBACCO COMPANY AND OTHERS.

BEFORE LACOMBE, COXE, WARD, AND NOYES,
CIRCUIT JUDGES.

COXE, *Circuit Judge* (concurring):

I approve of the proposed plan, not because I think it perfect, but because it is the best plan attainable. Perfection is impossible. The condition existing before the illegal combination was formed can not be restored; it has gone beyond the hope of recall. The plan which we have sanctioned eliminates the objectionable features prohibited by the antitrust act and permits no unreasonable or unlawful restraint of trade. In short, were the various corporations which the plan authorizes organized for the first time to-day, they would not be within the letter or the mischief of the statute. We have endeavored while punishing the guilty defendants—corporations and individuals—to remember that the rights of many innocent bondholders and shareholders are at stake and should be protected as far as is consistent with a complete compliance with the requirements of the law. The plan disintegrates

the combination, destroys the monopoly and liberates trade; but it accomplishes all this without a wanton destruction of property.

I have been impressed with the evident intention of counsel representing the various defendants to accept without reservation the result of the litigation and faithfully to carry out the plan, not only in letter but in spirit as well. Many suggestions have been advanced by counsel representing persons not parties to the suit which from an economic or ethical viewpoint are impeccant. When, however, it is remembered that we are acting only under the command of the Supreme Court, limited as to scope and time, it will be seen how powerless we are to make conditions favorable to the so-called "independents," when we can exact no reciprocal obligations from them. We are to ascertain and determine upon "some plan or method of dissolving the combination and of re-creating out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law." This we can do, and when it is done our commission ends. The consideration which has the greatest weight with me is that no one has proposed a better plan, the only alternative offered being the appointment of a receiver, a receiver for corporations solvent and prosperous. I agree with the Attorney General that such a calamity should be avoided, except as a last resort. It is impossible to forecast the disaster which would follow such a step. It would wreck a flourishing business upon which an army of employees are depending for a livelihood, it would

unsettle trade and it would punish with equal severity the innocent and the guilty. More than this, I am by no means convinced that it would not produce the very evil which this action was instituted to destroy. A receiver can dispose of the property in his hands only by a judicial sale to the highest bidder, who will take title sanctioned by a decree of the court creating the receivership. In the present case, the men best equipped to make this bid are the very men who now control the condemned corporations. It is surely possible, if not probable, that the property might thus come under their control with a title which will render them immune from further prosecution. For these reasons, thus briefly stated, I think that the plan, with the amendments directed by this court, should be adopted.

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA

v.

THE AMERICAN TOBACCO COMPANY ET AL.

BEFORE LACOMBE, COXE, WARD, AND NOYES, CIRCUIT JUDGES.

NOYES, *Circuit Judge* (concurring):

The Supreme Court of the United States, after finding the illegality of this combination placed the duty upon this court of hearing the parties—

> for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of re-creating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law.

And the Supreme Court added these words:

> In view of the considerations which we have stated, we leave the matter to the court below to work out a compliance with the law without unnecessary injury to the public or the rights of private property.

By these directions this court is required to enter into the examination of questions economical as well

as legal and to depart from the function of determining existing controversies to the decision of the legality of future proposed action. The duty imposed is extraordinary because the Supreme Court in imposing it was dealing with an extraordinary situation.

The question was as to the relief to be afforded. A decree forbidding corporate stockholding would have been inadequate, because the combination was largely based upon property ownership. Original conditions could not be restored. Immediate extreme measures would have inflicted irreparable injury upon innocent interests. It was necessary to provide a method for determining in advance whether a proposed plan of disintegration would harmonize with the law, and hence the direction to this court.

The magnitude and varied nature of the assets of the combination, the extent of its liabilities, the ramifications of its business, and the complexity of its affairs would make our duty difficult if we were required merely to apply rules of dissolution and recreation prescribed by the Supreme Court. But from the very intricacy of the case there are no rules. We are left without guide to turn a condition in violation of the law into a condition honestly in harmony with it. The only measure of the extent of rehabilitation required is the object to be attained. The evils found to exist alone indicate the measures required to meet them.

If, then, we approach the performance of our duty without an appreciation of the complexity of the

problem and of the difficulties under which the formulators of any plan must labor, we will not go far. If we are not satisfied with a substantial compliance with the law; if we strain after the ideal and put aside the practicable, it will be easy to bring on a receivership with its attendant losses to innocent investors. But that result was what the Supreme Court was solicitous of avoiding, and I think it intended that we should recognize the problem presented to us as a very practical one to be disposed of in a practical way. Moreover, in the performance of our duty we owe much to the Attorney General, who, while always insisting upon the rights of the public, and by such insistence bringing the plan into its present shape, has nevertheless—as it has seemed to me—felt that he, too, owed a duty to protect innocent interests and not to cause ruin and disaster by forcing extreme measures which might, even from the public point of view, in the end produce no better results than those at hand, and possibly infinitely worse.

Taking up the plan, we know at the outset that it is an honest one. It has been built up almost in our presence and whatever question there may be as to its merits, there is none of the good faith of its authors nor of the ability and conscientiousness with which they have performed their task.

The present combination has vast capitalization and assets. The corporations of the plan will have large capitalization and assets. Whether that is an objection should be considered.

The Supreme Court did not condemn the combination on account of the great amount of property which it had acquired. Indeed it must now be accepted that magnitude of business in and of itself does not constitute unlawful monopoly, at least up to the point where economy of production and management are thereby promoted. There must be something more—some unlawful or oppressive act or purpose in acquiring the business or after its acquisition—to come within the condemnation of the statute. But it can not be denied that there is an enormous inherent and collateral power incident to the holding by a single corporation of vast assets which no group of individuals although having similar possessions could obtain. There is such a potentiality of monopolization that a court in striving to bring about a condition in harmony with the law, should hesitate to approve the existence of a producing corporation having vast assets not necessary for the work of production. Consequently when it appeared in the formulation of this plan that the American Tobacco Company was to receive from the other corporations over a hundred million dollars in cash and securities which it was required to hold to meet its indebtedness but which it did not need in its business, the plan, notwithstanding many valuable features, seemed unacceptable. But, meeting the objections of the Attorney General, a way was found—as shown in the plan—of appropriating those funds to the payment of debts so that the readjusted American Company, still the largest of all, will possess some one hundred millions of property—mostly working

assets and brand values—as compared with the three hundred millions it formerly held. In view of modern commercial conditions, I think that the court should make no objection to the mere size of the corporations of the plan.

Taking up the question, then, whether the plan gives effect to the statute, the answer, as we have seen, depends upon whether it remedies the conditions found to violate the statute, and it is necessary to turn to the decision of the Supreme Court to find out those conditions.

Without examining the decision in detail, it is sufficient here to say that the court found broadly the combination to be in restraint of trade within the first section, and an attempt to monopolize and a monopolization within the second section, of the statute. In particular the court found among the bases for its conclusions: (*a*) Covenants of vendors and others binding themselves for long periods not to compete with the combination; (*b*) the absorption of the control of corporations supplying the elements essential to the manufacture of tobacco products and other corporate stockholding; (*c*) the existence of controlling "power in the hands of the few"; (*d*) the obtaining of control of the tobacco trade by wrongful and oppressive acts, agreements, and arrangements.

Obviously, the evil of restrictive covenants must be met by the termination of such covenants, and that is accomplished by the plan. It provides for the abrogation of all covenants made by vendor corpora-

tions, partnerships or individuals not to engage in the tobacco business, and for the termination of foreign restrictive covenants.

The evil of controlling the production of the elements essential to tobacco manufacture must be met by requiring the tobacco manufacturing corporations to be disconnected from the production of such elements. This seems to be fairly accomplished by the plan. The shares held by the combination in the corporation manufacturing tin foil and the voting shares held in the corporation manufacturing licorice are to be distributed. When that is done, none of the tobacco manufacturing companies of the plan will have any legal domination over the production of these essentials. So the evil of corporate stockholding is met by divesting the American Company of any interest in the snuff business, in the retail cigar business, and of its shares in other important corporations.

The evils pointed out by the Supreme Court growing out of the existence of power in the hands of a few to control the combination must be met by the destruction of such power. This power had its basis in the holding of a majority of the voting shares of the American Company by the individual defendants in this suit. It is proposed to destroy this power by giving the preferred stock of the American Company, which has heretofore had no voting rights, full voting power; by creating voting rights in the preferred shares of other corporations, and by so distributing shares that, in the language of the petition:

> No small group of men, nor even the twenty-nine individual defendants in the aggregate, will own the control of any of the principal, accessory or subsidiary companies defendant, and the control of the American Tobacco Company itself and of the new companies to be formed will be vested in a body of more than six thousand stockholders.

In addition to these provisions this court, at the instance of the Attorney General, will guard against the acquisition by the defendants of control in the future by enjoining them from increasing their aggregate shareholdings.

With this additional provision I think the requirement that power of control be taken out of the hands of the individual defendants sufficiently met. It is true that while shorn of legal control, they will own substantial minority interests in the different corporations and that in the practical workings of the affairs of a corporation a minority interest, through the inaction of the majority, may often control it. But the control of a corporation lies in the majority of its shares and if we see that the legal control of these corporations is placed in other hands than those of the defendants, I think that we go far enough. In my opinion we are not called upon to guard against the possible failure of the majority to exercise its power.

The next inquiry is whether the plan fairly meets the evil of obtaining control of the tobacco trade by oppressive tactics as well as the broad conclusion of illegality. And my opinion is that it does in case,

but only in case, the state of monopoly found to exist is ended by a division of business and a state of reasonably competitive conditions established.

This is the state of monopoly which now exists: The American Company, either directly or through its ownership of stock in other corporations, controls the manufacture of 75 per cent of the smoking tobacco manufactured in the United States; 80 per cent of the plug tobacco; 79 per cent of the fine cut; 80 per cent of the cigarettes; 13 per cent of the cigars; 90 per cent of the snuff, and 93 per cent of the little cigars.

Broadly speaking, the proposed plan of disintegration is to divide the tobacco business among four corporations, no one of which is to have a controlling interest therein. When the disintegration is accomplished, the business will be so distributed that no company will have substantially over 40 per cent in volume or value of any particular line. Furthermore, I am satisfied that there is to be a fair distribution of brands as well as of business.

Without examining the details of the plan, it is enough to say that careful study of it has convinced me that, in so far as the distribution of business is concerned, sufficient has been done to end the state of monopoly and to establish reasonable competitive conditions. If practicable, it might have been more desirable to divide the business into a greater number of parts. But as the plan stands it can not, in my opinion, be said that any one of the corporations will have such preponderating influence in the tobacco industry as to give it power to control the market

either as manufacturer, seller, or purchaser. The possibility of future acts of oppression is to be guarded against by a comprehensive injunction.

This brings us to the final question, which is whether the fact of common stockholding is a material objection to the plan.

Obviously, common ownership in the shares of the various corporations can not well be avoided. Each stockholder of the American Company has an undivided interest in its property remaining after the payment of its debts. When its assets are distributed among stockholders each is entitled to his proportionate share. When such distribution takes the shape of corporate shares, the necessary result is a common ownership of stock in different corporations. I am not convinced that, in the absence of statutory authority, any division by valuation and allotment could be effected, and if legally possible it is evident that the complicated conditions which would necessarily arise in carrying it out would render it impracticable within the time prescribed by the Supreme Court for the disintegration of this combination.

The objection to mutual stockholding is not that competition is eliminated in principle. Potential competition necessarily exists. The same conditions do not continue indefinitely. Stockholders die and estates are divided. Differences of opinion upon values lead to sales and exchanges. Potential competition with an open market must fairly end in real competition. But the objection is to present and not future conditions, and from an economic

point of view I have always thought it entitled to serious consideration. Manifest difficulties must attend the establishment of real competition between different corporations having the same body of stockholders. In the case of small corporations having few stockholders who directly participate in their management, they would be, perhaps, insuperable. They would decrease in proportion to the increase in the size of the corporations and the separation of the stockholders from the active management of their affairs, until, as I view it, in the case of the disintegration of a corporation having vast assets and a very large number of scattered stockholders, they would be so minimized as hardly to warrant consideration even from an economic standpoint.

That which has made me pause in the present case is the concentrated common stockholding of the individual defendants, but after careful consideration I have reached the conclusion that the objection should not operate to prevent the acceptance of the plan, but should call for most rigorous measures of injunctive relief to keep the various corporations apart, independent and free from connections or arrangements to prevent competition. In reaching this conclusion I am influenced by the proposition stated at the outset that we should take care that we do not by seeking the ideal reject the practicable and put in peril innocent property interests, and I am controlled, as I view it, by the decisions of the Supreme Court in the Northern

Securities and Standard Oil cases. It is impossible for me to read those decisions without being convinced that the Supreme Court in remanding this case to us did not intend that we should reject a plan upon the ground of pro rata distribution. I am also influenced, if not controlled, by the position taken by the Attorney General—the representative of the party plaintiff in the cause.

So taking the plan as a whole, with the essential measures of injunctive relief proposed by the Attorney General, I think that it meets the principal evils pointed out in the opinion of the Supreme Court; that it brings about a condition fairly in harmony with the law, and that it is the duty of this court to approve it as the best solution possible under all the circumstances of a very difficult practical problem.

In conclusion: The extent to which it has been necessary to tear apart this combination and force it into new forms, with the attendant burdens, ought to demonstrate that the Federal antitrust statute is a drastic statute which accomplishes effective results; which, so long as it stands on the statute books must be obeyed, and which can not be disobeyed without incurring far-reaching penalties. And, on the other hand, the successful reconstruction of this organization should teach that the effect of enforcing this statute against industrial combinations is not to destroy but to reconstruct; not to demolish but to recreate in accordance with the conditions which the Congress has declared shall exist among the people of the United States.

I concur in the opinion of Judge Lacombe and fully approve his disposition of the subjects not considered in this opinion.

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